



## STAFF REPORT

DATE: January 7, 2020

### **CONSENT**

**TO:** Mayor and City Council

**FROM:** Kristina Handt, City Administrator

**AGENDA ITEM:** Resignation of Chief Malmquist and Separation Agreement

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### **BACKGROUND:**

Fire Chief Greg Malmquist signed a separation agreement on December 31, 2019 that provides for his resignation effective January 10, 2020.

### **ISSUE BEFORE COUNCIL:**

Should the Council accept Greg Malmquist's resignation and approve the separation agreement?

### **PROPOSAL DETAILS/ANALYSIS:**

Included in your packet is a copy of the separation agreement signed by Malmquist. It provides for his resignation effective January 10, 2020. He would receive one lump sum payment equal to six months of salary and benefits the following week. It also provides for a release of claims and notes various statutory provisions that apply.

### **FISCAL IMPACT:**

Estimated cost to the city is about \$60,000. There will be no additional PTO payout as the employee has already used all earned PTO while on leave.

### **OPTIONS:**

- 1) Accept Resignation and Approve Separation Agreement
- 2) Accept Resignation, Amend and then Approve Separation Agreement
- 3) Do not accept resignation and separation agreement

### **RECOMMENDATION:**

If removed from the consent agenda:

***“Motion to accept resignation of Greg Malmquist and approve Separation Agreement.”***

### **ATTACHMENTS:**

- Separation Agreement

**SEPARATION AGREEMENT AND RELEASE OF CLAIMS  
BETWEEN THE CITY OF LAKE ELMO, MINNESOTA  
AND GREG MALMQUIST**

**THIS AGREEMENT** is made and entered into by and between the City of Lake Elmo, a Minnesota municipal corporation (the “City”), and Greg Malmquist (the “Employee”) as of the date indicated below.

**WITNESSETH:**

**WHEREAS**, the Employee has been employed by the City since September 1, 1984; and

**WHEREAS**, the Employee is presently employed as the Fire Chief for the City; and

**WHEREAS**, both the City and the Employee have concluded that it is in the best interests of both parties that the employment of the Employee by the City be discontinued and terminated in accordance with the following terms and conditions.

**NOW, THEREFORE, IN CONSIDERATION** of the following mutual covenants and agreements, the sufficiency of which is hereby acknowledged by both parties, the City and the Employee agree as follows:

1. Resignation. The Employee hereby submits his resignation effective January 10, 2020 (the “Resignation Date”). The City hereby accepts such resignation, effective on the Resignation Date. The City and the Employee waive any notice that would otherwise be required.

2. Assistance with Transition. The Employee shall reasonably assist with the transition caused by this resignation. Within two business days of the execution of this Agreement, the Employee shall provide all relevant work-related passwords and access codes in his possession to the City Administrator. The Employee shall reasonably respond to any request made by the City Administrator or City staff regarding passwords or any other information or files relating to the execution of his job duties. All City property including, but not limited to, keys, vehicles, cell phone, pager, etc. must be returned to the city within two business days of the Employee signing this Agreement.

3. Severance Pay.

a. The City shall continue to pay the Employee for all time worked for the City up to the Resignation Date, less applicable federal and state taxes, employment taxes, PERA, and other customary withholdings. The City will continue to pay the Employee benefits pursuant to the City’s benefit

plans up to the Resignation Date. These payments shall be made pursuant to the City's usual payroll processes and schedules.

- b. The City shall pay the Employee for any outstanding balance of paid time off ("PTO"). This payment shall be made in a lump sum payment once all rescission periods have passed.
- c. The City shall pay the amount of \$1,200.00 into Employee's Health Savings Account (HSA). Employee is responsible for compliance with any applicable laws relating to contribution limits and use of HSA funds.
- d. The City shall pay the Employee an amount equal to six months of salary, totaling a lump-sum of \$44,096.00, prior to being reduced by applicable federal and state taxes, employment taxes, PERA, and other customary withholdings.
- e. Employee shall be eligible to continue participation in the group medical and dental plan only in which he currently participates for a period not to exceed six months from the date of resignation. This participation will continue at the same level as Employee's present participation (i.e., family plan participation). Contingent upon Employee's continued compliance with this Agreement, the City will continue to pay its share of the premium for this plan on the same basis as exists on the date of this Agreement for the full six-month period, or until Employee becomes eligible for medical and dental coverage through another employer, whichever is earlier. The City will deduct an amount equivalent to the employee's share of six months' worth of premiums for the medical plan from the severance payment being made by the City pursuant to paragraph 3 (a) of this Agreement, such amount being \$297.12. After the six month period is over, and assuming that the Employee does not become eligible for medical coverage through another employer, the Employee is entitled to continuation of his health insurance benefits pursuant to the Consolidated Omnibus Reconciliation Act ("COBRA"), 29 U.S.C. § 1161, *et seq.* If the Employee elects to continue his coverage pursuant to COBRA after the six-month period, he is responsible for payment of his health insurance premiums.

The Employee acknowledges that the payments described above are sufficient consideration for the Agreement. The Employee agrees that, except for the payments listed above, the Employee is not entitled to any further compensation, salary, overtime, or compensatory time from the City.

4. Release. In consideration of the above referenced Severance Pay in section 3, the Employee, for himself, his heirs, administrators, representatives, successors, and

assigns, hereby releases and forever discharges the City, and its attorneys, agents, representatives, employees, former employees, insurers, and assigns of and from any and all, past, present, or future claims, demands, obligations, actions, or causes of action at law or in equity, whether arising by statute, common law, contract, or otherwise, and for all claims for damages of whatever kind or nature, and for all claims for attorneys' fees and costs and expenses, including but not limited to all claims of any kind arising out of the Employee's employment, including but not limited to whistleblower, harassment, discrimination, wrongful termination, defamation, intentional/reckless/negligent infliction of emotional distress, constructive discharge, claims under the City's employee handbook, or any actions arising from discussions in efforts to negotiate the Agreement.

In consideration of the above referenced Severance Pay at section 3, the Employee further acknowledges that he is knowingly and voluntarily waiving all possible rights or claims arising under: the Minnesota Human Rights Act, Minnesota Statutes, Chapter 363A; Minnesota Government Data Practices Act, Minnesota Statutes Chapter 13; Equal Employment Opportunity Act; Americans with Disabilities Act of 1990, As Amended; Age Discrimination in Employment Act; Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e – e-17; Family and Medical Leave Act, 29 U.S.C. §§ 2601-54; Americans with Disabilities Act, 42 U.S.C. § 12101-117; the Rehabilitation Act of 1973, 29 U.S.C. § 701-96i; the Public Employment Labor Relations Act, Minn. Stat. §§ 179A.01-.30; the Minnesota Occupational Health and Safety Act, Minn. Stat. §§ 182.65-.676; the Minnesota Whistleblower Act, Minn. Stat. §§ 181.931-.935; and the state and federal Fair Labor Standards Acts, 29 U.S.C. §§ 201-19, Minn. Stat. §§ 177.21-.35 Employee acknowledges that he has had an opportunity to consult with his attorney concerning the waiver and content of the rights available under these laws.

It is specifically understood that the aforementioned Release is intended to include only those claims arising from any conduct, event, or transaction occurring prior to the date of this Agreement and intended to include any and all claims for unknown injuries and/or damages, unanticipated injuries and/or damages, and unexpected consequences of injuries and/or damages.

The Employee further acknowledges that he fully understands the terms of this Separation Agreement and Release of Claims, that pursuant to the Age Discrimination in Employment Act, he has had 21 days to consider it and seek the advice of his attorney and/or financial advisor, and that he is signing it freely and voluntarily. The Employee understands that if he signs this Agreement and Release prior to the expiration of the 21-day period, that act constitutes a waiver of his right to consider the Agreement for 21 days.

The Employee understands that this is a resignation and acknowledges that he is waiving any rights under city ordinance or state law, including any rights he may have to a hearing.

Notwithstanding the foregoing, nothing in this Agreement releases or waives, or will be construed to release or waive, any claim for enforcement of the terms of this Agreement. This release and waiver of claims excludes, and the Employee does not waive,

release, or discharge claims that cannot be waived by law, such as claims under the Minnesota Unemployment Insurance Law, Minnesota Workers Compensation Act, or the Minnesota Fair Labor Standards Act.

5. Representation by Counsel. The Employee represents to the City that he has had an opportunity to consult counsel of his choosing with respect to this Agreement and all matters covered by and relating to it. The Employee further agrees and represents that he has not received or relied upon any advice or representations by the City or the City's counsel in entering into this Agreement. The Agreement shall be binding upon the Employee and inure to the benefit of the City and its respective successors, assigns, subsidiaries, heirs, executors, personal representatives, and agents.

6. Attorneys' Fees and Expenses. Each party will be responsible for the payment of their own attorneys' fees and expenses in connection with the matter.

7. No Admission of Liability. It is specifically understood that by reason of agreeing to the Agreement, the parties hereby released admit absolutely no liability, misconduct, wrongdoing, unethical or unprofessional conduct of any sort, and it is further specifically understood that the Agreement shall not be construed as an admission of liability, misconduct, wrongdoing, unethical or unprofessional conduct of any sort on the part of any party.

8. Voluntary and Knowing Action. The parties acknowledge that they have thoroughly read and understand the terms of the Agreement, and that they are voluntarily entering into the Agreement to resolve the matter.

9. Rescission/Revocation. The Agreement is subject to the following rescission/revocation periods as provided by law:

Age Discrimination in Employment Act, 7 days, 29 U.S.C. § 626(f)(1)(G);  
Minnesota Human Rights Act, 15 days, Minn. Stat. § 363A.31, subd. 2.

Once the Agreement has been executed, the Employee understands that he has the right to rescind and/or revoke the waivers and releases contained in this Agreement. To be effective, the rescission or revocation must be in writing and delivered to the City either by hand or by mail within the 7-day period for the Age Discrimination in Employment Act, or within the 15-day period for the Minnesota Human Rights Act. If delivered by mail, the rescission or revocation must be:

- (a) postmarked within the applicable 7- or 15-day period;
- (b) properly addressed to the City; and
- (c) sent by certified mail, return receipt requested.

**The City's address is as follows: City Hall  
Attention: City Administrator  
3880 Laverne Avenue North, Suite 100**

**Lake Elmo, MN 55042**

10. Veterans' Preference. The Employee acknowledges that he is aware of the rights and obligations applicable under the Minnesota Veterans' Preference Act and hereby waives them.

11. Complete Agreement. The parties acknowledge and represent that no promise or representation not contained in the Agreement has been made to them.

12. Governing Law. The Agreement will be construed, enforced, and governed in accordance with the laws of the State of Minnesota.

13. Reasons for Agreement. Pursuant to Minn. Stat. § 13.43, subd. 2(a)(6), the City states that the reason it is entering into this settlement agreement is to amicably separate the employment relationship with Employee, and provide him with certain benefits in light of his resignation from employment.

14. Compliance with IRS Code Section 409A. To the extent that any of the compensation and/or benefits payable under this Agreement are subject to Internal Revenue Code Section 409A ("Section 409A"), the Employee and City will adhere to the provisions of Section 409A and any Treasury Regulations or other guidance issued thereunder with regard to such compensation and/or benefits. This Agreement is intended to comply with the requirements of Section 409A. Accordingly, all provisions included in this Agreement, or incorporated by reference, will be interpreted and administered in accordance with that intent. If any provision would otherwise conflict with or frustrate this intent, that provision will be interpreted and deemed amended or limited so as to avoid the conflict. Each payment under this Agreement will be treated as a separate payment for purposes of Section 409A.

15. Notice and Cure. The City will give Employee written notice and ten (10) days right to cure any alleged default before exercising any of its remedies under this Agreement

**IN WITNESS WHEREOF**, the City and the Employee have approved and executed the Agreement this \_\_\_\_\_ day of January, 2020.

**CITY OF**

**EMPLOYEE**

By: \_\_\_\_\_  
Mike Pearson, Mayor

By: \_\_\_\_\_  
Greg Malmquist

By: \_\_\_\_\_  
Julie Johnson, City Clerk